EXTENSION OF REMARKS

OF

HON. JACOB K. JAVITS

OF NEW YORK

IN THE HOUSE OF REPRESENTATIVES

Monday, February 7, 1949

Mr. JAVITS. Mr. Speaker, appended are excerpts from an address made by Irving Payson Zinbarg, Esq., a member of the New York Bar and one of my constituents, on the subject of the Federal Tort Claims Act. Without expressing my agreement or disagreement with the views expressed in this address they involve the point of view of the practicing lawyer in cases affected by this Act and should prove of interest to the Members on how this type of legislation is working out in practice:

FEDERAL TORT CLAIMS ACT

I have been asked to talk tonight about negligence cases and more particularly about the Federal Tort Claims Act which is fairly new, yet is old enough for us to have formed some opinion as to whether or not we like it.

You know, as I do, that none of us may, for a wrong done us by it, sue a government, be it municipal, State, or Federal, without the consent of that government.

Our city of New York has given blanket consent for such lawsuits and during my work at the trial bar, I have also brought many actions against the city for injuries or wrongful death resulting from negligence. There is no limitation on how much one may sue for, nor does the city say how large the attorneys' fees shall be.

The State of New York consents to the bringing of suits against it for its negligence and it has set up the court of claims for decision by a judge, without a jury, of such cases. No restriction is placed on the size of the attorneys' fees.

On August 2, 1946, the Congress of the United States made into law the Federal Tort Claims Act which provides that the United States like the city or State of New York, now is treated as any other tort feasor, and is liable for damages resulting from the negligence of any employee of the Government, while acting within the scope of his employment, in accordance with the law of the place where the tort occurred.

The act, among other things, gives the Federal court jurisdiction in such cases, and provides that the district judge take testimony and determine the issues without a jury.

Although it is now more than 2 years since the Federal Tort Claims Act became law, and although I am admitted to practice in the United States district courts, the United States circuit court of appeals, and the United States Supreme Court, I have been consistently declining retainers in tort actions brought under the Federal Tort Claims Act.

Why? Because in enacting this law the Congress on the one hand seemingly helped injured persons, or the widows and orphans of men killed, to speak up for payment for the wrongs done them, but the Congress on [redacted]g hand, gagged the mouths of these [redacted]ed, or widows, or orphans, by providing no adequate means for these citizens obtaining experienced counsel to present their claims. They fixed the attorneys' fees at 10 percent under some circumstances, and at not exceeding 20 percent under any circumstances. Since the net fees of trial lawyers like myself are usually about 25 percent of the recovery, after remitting the share of the attorneys who forwarded the claims to us, neither we, nor the general law practitioner, nor legal specialist in other fields can afford to accept retainers under the Federal Tort Claims Act for the niggardly payments provided therein. Remember, I invest my work, my staff's work, my overhead and all of our energies on the assumption that I will obtain a judgment, settlement, or verdict for the claimant. I take the risk that if I do not succeed in getting the client any money, I've lost all.

But, you ask, why should good, capable, experienced, well-equipped attorneys like yourselves refer tort actions at all? Why should a tort action differ from an action for breach of contract? After all, in either action the plaintiff has the burden of proving what he claims, and in either action the plaintiff bears the burden of proving his damages. In either action the defendant must, by cross-examination or by his own witnesses either attempt to defeat the claim or, at least, mitigate the extent of the damages. Why should attorneys' fees in tort actions be measured by a different yardstick than fees in contract actions? Why is the provision for payment of attorneys' fees as contained in the Federal Tort Claims Act so inadequate—so unjust?

In tort actions, the parties are usually strangers to each other, and since one party knows nothing about the other party to the lawsuit, or about his background, or his employees who may have committed the tort, neither can furnish his attorney with any information wherewith to attack the other party. Therein lies your first difference between tort and contract. In the contract action there has been some dealing with, some research into background of, the other party, either before or during the business venture. You know some weak or vulnerable spot in the other side.

In the tort action, it is for you to dig up motor vehicle reports, driving records, autopsies, hospital records, medical records, police records, military records, Workmen's Compensation reports, weather reports [redacted] any number and type of reports or record[redacted] may be used for or against your clien[redacted] items of personal history are usual[redacted] vant in contract actions.

In tort, as contrasted with cont[redacted] tions, the exhibits and photographs [redacted] you to obtain and the witness is usually for you to find and interview. The witness may be a businessman, professional man, policeman, laborer, mechanic or tramp—all strangers to you, to your client, to the opposition. Immediately, this involves going yourself, sending an assistant, or having available an honest, reliable, ethical investigator to go to the scene, to find the witnesses, if any, and bring back their statements to you. If, as many necessary witnesses, the principal eyewitness is unwilling to give statements of what he saw, or unwilling to go to court, the investigator must be clever, educated, experienced or persuasive enough, to be able to point out that the last kernel of hope for justice for your client will be shattered unless the witness treats your client as he would like to be treated were he in the same pre[redacted]ment.

[redacted]ou, your assistant, or the investi-

addition to these, you or an assistant, must talk with the doctors, scientists, chemists, technicians, experts to get their views. You must know how, and prepare to meet these experts on their own battlefields. This may not seem to differ greatly from getting the views of the expert, and knowing how to examine, in a contract action involving, let us say, the manufacture of a scaffold, but it is really different. Let me illustrate that! Assume you are retained in a personal injury and death action in the Supreme Court of the State of New York, against not the employer, but a third party, who is alleged to have negligently hung a scaffold on a building. You must know the mechanics of a scaffold, its manufacture or composition, as well as the proper manner of rigging it and, possibly, the nature, durability or composition of a parapet wall, masonry, a smoke stack, black iron, sheet metal, a block and tackle, whether wire cable or sisal, hemp, flax or jute rope is proper, State and municipal safety rules, labor laws, penal law, ordinances, etc. All this goes far beyond your contract action concerning the scaffold manufacture.

You must be far more expert in a tort action than in a contract action, to examine the expert. In addition to that you must be versed, somewhat, in medicine, to examine the medical technicians and experts in your negligence case.

In a motor-vehicle case, should some witness say he was driving the vehicle at a rate of 10 miles an hour, you must know that arithmetically he covered 14.666 feet in 1 second, thereby proving, by his lips, that the pedestrian or other vehicle was either hit or not as is claimed.

These, then, are only some of the essential materials and tools which go into the crucible wherein your tort action is prepared for trial.

But, how in the world can claimants and their attorneys afford to retain experienced tort-trial counsel under the Federal Tort Claims Act? Who will pay for all the necessary work and expenses connected with properly presenting the claim if the Congress has said to the district trial judge, "Pay the attorneys 10 to 20 percent for their services, and those of any help they may require"? How can the average Federal Tort Claims Act claimant ever succeed in obtaining experienced tort-trial counsel to get him as good results as he would likely get if he were not a Federal claimant, but instead were fortunate enough to be a litigant in a State court. Write or ask your Congressman [redacted]